UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, ., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, ., Defendants.	Case No. 1:17-cv-02590 (TSC)
UTAH DINÉ BIKÉYAH, ., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, ., Defendants.	Case No. 1:17-cv-02605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, ., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, ., Defendants.	Case No. 1:17-cv-02606 (TSC) CONSOLIDATED CASES

AMICUS CURIAE BRIEF OF LAW PROFESSORS SUPPORTING PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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STATEMENT OF INTEREST

Amici are law school professors who are experts in the fields of public land law and natural resources law. Most have written and published extensively in these fields. Through our

designations, not repeals or modifications of monuments, and the Act's purpose and legislative history confirm this narrow delegation of congressional authority. In addition, Congress's major reform of public land laws in the 1970s created a comprehensive statutory and administrative regime for public lands management that leaves no room for capricious executive authority that is unauthorized by statute.

Modern federal public lands management is largely a creature of legislation. At first federal lands were generally left open for unpermitted public use, but since the earliest days of federal conservation policy, public lands management depended on Congress's delegations of authority to the Executive. The Forest Reserve Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891),

Congress's express parameters of establishing monuments to protect objects of historic or scientific interest. It is unwarranted when, as here, the President exceeds his delegated authority under the Antiquities Act and eviscerates those protections.

the conclusion that the President is not authorized to revoke o

, 252 U.S. 450, 454–55 (1920), Ralph Cameron, a miner and entrepreneur who had staked claims throughout the South Rim of the Grand Canyon, challenged President Theodore Roosevelt's 1908 Proclamation of the 808,000-acre Grand Canyon National Monument. The Supreme Court upheld the Monument, concluding, "The Grand Canyon . . . 'is an object of unusual scientific interest.' It is the greatest eroded canyon in the United States . . . is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders . . . ." , 252 U.S. at 455–56. The Court did not discuss whether the monument was "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). However, one can surmise from the quoted text that the Court believed the standard was quite easily met. JOHN D. LESHY, THE MINING LAW: A STUDY IN P

Congress to itself and have been exercised by Congress on several occasions. Act of Mar. 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956) (revoking Castle Pinckney National Monument); An Act to Authorize the Exchange of Certain Lands at Black Canyon of the Gunnison National Monument, Colorado, Pub L. No. 85–391, 72 Stat. 102 (1958); An Act to Establish Grand Canyon National Park, in the State of Arizona, Pub. L. No. 65–277, 40 Stat. 1175 (1919). , John Ruple,

, 43 HARV. ENVT'L. L. REV. 32 (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272594 (discussing Congress's rejection of various bills that would have authorized the President to modify Monument Proclamations).

Several public lands statutes from the same era as the Antiquities Act, by contrast, do authorize the President to rever T p em ő Pawa l

because Congress previously delegated only the power to create forest reservations. 29 CONG. REC. 2677 (1897) (statement of Rep. Lacey). Representative Lacey o

185, 185–86 (1938). In this Attorney General's Opinion, Homer Cummings evaluated the recommendation from the Acting Secretary of the Interior that President Roosevelt revoke the 3.4-acre Castle Pinckney National Monument, which had been established by President Coolidge in 1924. Castle Pinckney was the site of the first takeover of Union property by the Confederacy in the Civil War, but apparently virtually no one supported its designation as a monument. . at 186. Cummings noted, "My predecessors have held that if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation." . Because Congress only authorized the creation of monuments in the Antiquities Act, Cummings advised the Secretary of the Interior that an act of Congress would be required to remove the Monument's status. The Monument designation was eventually extinguished by Congress, and the property was transferred to the State of South Carolina. Act of Mar. 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956).

This historical backdrop of the Antiquities Act and other federal public land laws of that era clarifies that the President may not supplement the congressional delegation of power to create national monuments with an unmoored assumption of power to eliminate or modify them. "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" , 552 U.S. 491, 524–25 (2008) (, 343 U.S. 579, 585 (1952)). In the public lands arena, the Constitution clearly vests authority in the Congress. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States"). Congress has carefully

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not warrant much attention, let alone deference. .

delegated to the President and delineated a role in making withdrawals of land for various public purposes. In exercising his authority to establish national monuments the President should be afforded great deference from the courts, but only so long as the President is carrying out a power delegated to him by Congress. Here, however, the President's revocation of the Bears Ears National Monument is incompatible with the expressed will of Congress, which provided only a limited delegation to create monuments for protective purposes, and not the power to revoke or modify them. , 459 F.2d 1231, 1248 (D.C. Cir. 1971) (deference to executive action is warranted but only up to the point that the executive is acting "in the manner prescribed by statute, without reference to irrelevant or extraneous considerations.").[3]

D. Uncontested prior revisions and reductions cannot be construed to modify the Antiquities Act.

No President has ever attempted to revoke a national monument, and until President Trump's radical reduction of Bears Ears and Grand Staircase Escalante National Monuments, no President had reduced a monument for fifty-five years. During those decades, Congress passed virtually all of the nation's major environmental statutes, including the modern public lands

reservations. , 236 U.S. 459, 474 (1915) (upholding presidential authority to withdraw lands as naval petroleum reserve, a power since revoked by Congress in the Federal Land Policy and Management Act (FLPMA), Act of Oct. 21, 1976, Pub. L. No. 94–579, § 704, 90 Stat. 2743, 2792 (1976)). recognized withdrawal authority in aid of legislation to prevent valuable oil reservd

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the nation's public lands in the post-World War II period, including heightened interest in recreation and conservation. .

In response, Congress mandated comprehensive management for the vast majority of federal lands. Together, Bureau of Land Management and Forest Service lands comprise over 440,000,000 acres of the 621,000,000 total acres of lands owned by the United States. CAROL HARDY VINCENT, ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 21, Table 5 (2017). To manage those lands, FLPMA and NFMA vest the Bureau of Land Management and Forest Service with broad powers through a detailed process that provides for ample public participation. Congress reserved for itself other decisions about modifying protective status and required that management decisions be made in a tiered process emphasizing long term planning. 43 U.S.C. § 1701(a)(2) ("national interest will be best realized if the public lands and their resources are . . . inventoried and their present and future use is projected through a land use planning process[.]"); and 16 U.S.C. §§ 1602, 1603, 1604 (mandating comprehensive forest land resource inventories and land and resource management plans).

A. FLPMA and Bureau of Land Management Lands.

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784, was a

1976 enacted FLPMA."). The Report recommended that Congress reserve to itself "exclusive authority to withdraw or otherwise set aside public lands for specified limited-purpose uses" and revisit the existing delegations of authority that could be made without legislative action. ONE THIRD OF THE NATION'S LANDS, , at 2.

Congress took this recommendation and completely revamped Executive withdrawal authority, replacing it with detailed and specific delegations to the Secretary. 43 U.S.C. § 1714.

Sanjay Ranchod,

> executive authority to create, modify, and terminate withdrawals and reservations. . . .
>
> and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.

H.R. Rep. No. 94–1163, 94th Cong., 2nd Sess., at 9 (May 15, 1976) (emphasis added).

Other provisions of FLPMA highlight the importance of long-term planning to support prudent federal land management. Land use plans were mandated for the public lands "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a). Congress embraced this planning policy because it found that "the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts." 43 U.S.C. § 1701(a)(2). It is significant that the same Congress that reworked the withdrawal statutes left intact the delegated authority under the Antiquities Act and emphasized the importance of planning efforts to serve the national interest. Construing the Antiquities Act to permit a President to move lands in and out of a prior protected designation is inconsistent with the congressional scheme, serves no protective role, and disrupts the processes delegated to the agencies. Squillace, et al., , note 4.

B. FLPMA and the General Mining Law of 1872.

Congress also imposed limited requirements on mining in FLPMA. The General Mining Law of 1872, 30 U.S.C. § 22, was passed during an era when Congress encouraged the opening and disposition of public lands. It has survived Congress's wholesale changes in public lands management with relatively little change. The Mining Law allows for miners' self-initiated

entry, exploration, and eventual appropriation of unreserm ul

to respond to changing circumstances and best suited to ensure lands are managed accordingly. Within this comprehensive vision, Congress expressly preserved the single presidential power to establish monuments under the Antiquities Act for protective purposes, while clarifying that the Act contains no authorization to revoke, modify, or otherwise unravel monuments that have been proclaimed.

CONCLUSION

No President until now has attempted to revoke a national monument. No President has changed monument boundaries for more than half a century. The reasons for this are two-fold. First, the Antiquities Act delegates to the President a narrow protective power to establish monuments and does not include the power to revoke or reduce them. Second, the broader scheme of public land law reinforces the very limited role that

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Respectfully submitted,

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APPENDIX

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